

July 2012

# GUN CONTROL

## Sharing Promising Practices and Assessing Incentives Could Better Position Justice to Assist States in Providing Records for Background Checks



G A O

Accountability \* Integrity \* Reliability

## Why GAO Did This Study

The 2007 Virginia Tech shootings raised questions about how the gunman was able to obtain firearms given his history of mental illness. In the wake of this tragedy, the NICS Improvement Amendments Act of 2007 was enacted to, among other things, provide incentives for states to make more records available for use during firearm-related background checks. GAO was asked to assess the extent to which (1) states have made progress in making mental health records available for use during NICS checks and related challenges, (2) states have made progress in making unlawful drug records available and related challenges, (3) DOJ is administering provisions in the act to reward and penalize states based on the amount of records they provide, and (4) states are providing a means for individuals with a precluding mental health adjudication or commitment to seek relief from the associated federal firearms prohibition. GAO reviewed laws and regulations, analyzed Federal Bureau of Investigation data from 2004 to 2011 on mental health and unlawful drug use records, interviewed officials from a nongeneralizable sample of 6 states (selected because they provided varying numbers of records) to obtain insights on challenges, and interviewed officials from all 16 states that had legislation as of May 2012 that allows individuals to seek relief from their federal firearms prohibition.

## What GAO Recommends

GAO recommends that DOJ share promising practices in making mental health records available and assess the effectiveness of rewards and penalties and how to best implement them. DOJ agreed with the results.

View [GAO-12-684](#). For more information, contact Carol Cha at (202) 512-4456 or [chac@gao.gov](mailto:chac@gao.gov).

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## What GAO Found

From 2004 to 2011, the total number of mental health records that states made available to the National Instant Criminal Background Check System (NICS) increased by approximately 800 percent—from about 126,000 to 1.2 million records—although a variety of challenges limited states' ability to share such records. This increase largely reflects the efforts of 12 states. However, almost half of all states increased the number of mental health records they made available by fewer than 100 over this same time period. Technological, legal, and other challenges limited the states' ability to share mental health records. To help address these challenges, the Department of Justice (DOJ) provides assistance to states, such as grants and training, which the 6 states GAO reviewed reported as helpful. DOJ has begun to have states share their promising practices at conferences, but has not distributed such practices nationally. By disseminating practices that states used to overcome barriers to sharing mental health records, DOJ could further assist states efforts.

The states' overall progress in making unlawful drug use records available to NICS is generally unknown because of how these records are maintained. The vast majority of records made available are criminal records—such as those containing arrests or convictions for possession of a controlled substance—which cannot readily be disaggregated from other records in the databases checked by NICS. Most states are not providing noncriminal records, such as those related to positive drug test results for persons on probation. On May 1, 2012, DOJ data showed that 30 states were not making any noncriminal records available. Four of the 6 states GAO reviewed raised concerns about providing records outside an official court decision. Two states also noted that they did not have centralized databases that would be needed to collect these records. DOJ has issued guidance for providing noncriminal records to NICS.

DOJ has not administered the reward and penalty provisions of the NICS Improvement Amendments Act of 2007 because of limitations in state estimates of the number of records they possess that could be made available to NICS. DOJ officials were unsure if the estimates, as currently collected, could reach the level of precision needed to serve as the basis for implementing the provisions. The 6 states GAO reviewed had mixed views on the extent to which the reward and penalty provisions—if implemented as currently structured—would provide incentives for them to make more records available. DOJ had not obtained the states' views. Until DOJ establishes a basis for administering these provisions—which could include revising its current methodology for collecting estimates or developing a new basis—and determining the extent to which the current provisions provide incentives to states, the department cannot provide the incentives to states that were envisioned by the act.

Nineteen states have received federal certification of their programs that allow individuals with a precluding mental health adjudication or commitment to seek relief from the associated firearms prohibition. Having such a program is required to receive grants under the 2007 NICS act. Officials from 10 of the 16 states we contacted said that grant eligibility was a strong incentive for developing the program. Reductions in grant funding could affect incentives moving forward.

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## Abbreviations

ATF	Bureau of Alcohol, Tobacco, Firearms and Explosives
BJS	Bureau of Justice Statistics
CJIS	Criminal Justice Information Services
DOJ	Department of Justice
FBI	Federal Bureau of Investigation
HHS	Department of Health and Human Services
HIPAA	Health Insurance Portability and Accountability Act
III	Interstate Identification Index
JAG	Edward Byrne Memorial Justice Assistance Grants Program
NARIP	NICS Act Record Improvement Program
NCHIP	National Criminal History Improvement Program
NCIC	National Crime Information Center
NIAA	NICS Improvement Amendments Act of 2007
NICS	National Instant Criminal Background Check System
POC	point of contact
R.E.A.C.H.	Report, Educate, and Associate Criminal Histories
SEARCH	National Consortium for Justice Information and Statistics

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Washington, DC 20548

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## Congressional Requesters

The April 2007 Virginia Tech shootings raised questions about how the gunman in this incident was able to obtain firearms despite a national background check process and his history of mental illness. Under the Brady Handgun Violence Prevention Act<sup>1</sup> and implementing regulations, the Federal Bureau of Investigation (FBI) and designated state and local criminal justice agencies use the FBI's National Instant Criminal Background Check System (NICS) to conduct background checks on individuals seeking to purchase firearms from federally licensed firearm dealers or obtain permits to possess, acquire, or carry firearms. Persons are prohibited from possessing firearms under federal law if they, among other things, have been convicted of a felony, have been involuntarily committed to a mental institution, or are unlawful users of or addicted to any controlled substance. Most of the records in the databases checked by NICS originate with states, which are not required to submit records to NICS, but do so voluntarily for public safety and other law enforcement purposes. In previous reports, we noted that states had made progress in automating records and making them nationally available for law enforcement purposes, but that continued progress would involve a partnering of federal, state, and local resources and long-term commitments from all governmental levels.<sup>2</sup>

In the wake of the Virginia Tech tragedy, the NICS Improvement Amendments Act of 2007 (NIAA) was enacted into law to, among other things, help states make more records available for use during NICS background checks.<sup>3</sup> For example, the act provides for certain financial incentives, such as rewards and penalties, based on the percentage of records each individual state makes available. The act also requires the Department of Justice (DOJ) to make NICS Act Record Improvement

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<sup>1</sup>Pub. L. No. 103-159, 107 Stat. 1536 (1993).

<sup>2</sup>See, for example, GAO, *National Criminal History Improvement Program: Federal Grants Have Contributed to Progress*, [GAO-04-364](#) (Washington, D.C.: Feb 27, 2004), and *Bureau of Justice Statistics Funding to States to Improve Criminal Records*, [GAO-08-898R](#), (Washington, D.C.: July 8, 2008).

<sup>3</sup>Pub. L. No. 110-180, 121 Stat. 2559 (2008).

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Program (NARIP) grants available to states to improve their ability to provide records. To be eligible for a grant, a state must (1) provide DOJ with a reasonable estimate of the number of NICS-related records it possesses and (2) establish a program that allows individuals who have been prohibited from possessing firearms due to a mental health-related adjudication or commitment to seek relief from the associated federal firearms prohibition.

In this context, you requested that we assess the progress DOJ and states have made in implementing key provisions of the NIAA. Accordingly, this report addresses the extent to which

- states have made progress in making mental health records available for use during NICS background checks and DOJ could take actions to help states overcome any challenges in providing these records,<sup>4</sup>
- states have made progress in making unlawful drug use records available for use during NICS background checks, and DOJ could take actions to help states overcome any challenges in providing these records,
- DOJ has administered the reward and penalty provisions provided for in the act and whether selected states report that these provisions provide incentives to make records available to the FBI, and
- states have established programs that allow individuals who have a precluding mental health adjudication or commitment to seek relief from the associated federal firearm prohibition.

To determine state progress in making mental health and unlawful drug use records available, we analyzed FBI data from fiscal years 2004 through 2011—about 4 years before and after the enactment of NIAA—on the number of such records that states made available. To assess the reliability of these data, we questioned knowledgeable officials about the data and the systems that produced the data, reviewed relevant documentation, examined data for obvious errors, and (when possible) corroborated the data among the different agencies. We determined that

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<sup>4</sup>When states submit mental health records to the NICS Index, they provide descriptive information about the prohibited individual (such as the individual's name and date of birth), along with a code to identify which federal prohibitor applies. States do not share an individual's actual treatment records or other health care records, nor do they provide specifics related to the individual's prohibiting mental health condition. Use of the term "mental health records" in this report should be understood to mean the identifying information on prohibited persons supplied by states to the NICS Index.

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the data were sufficiently reliable for the purposes of this report. To assess the extent to which DOJ is providing assistance to help states overcome challenges in making records available, we reviewed guidance DOJ provided to states and attended a DOJ-hosted regional NIAA conference. Additionally, we analyzed all NARIP grant applications from 2009 to 2011 submitted by states, territories, and tribal entities to identify challenges that 28 unique applicants reported facing in making records available and the amount of funding these applicants believed was necessary to overcome their challenges. Further, we interviewed officials from a nonprobability sample of 6 states (Idaho, Minnesota, New Mexico, New York, Texas, and Washington) to discuss challenges they faced in sharing mental health and unlawful drug use records. We selected these states to represent a range of factors, including the number of mental health records and unlawful drug use records made available for NICS checks and whether the state received a NARIP grant. We also interviewed officials from various DOJ components with responsibility for managing and maintaining NICS records, including the Bureau of Justice Statistics (BJS), the FBI's Criminal Justice Information Services (CJIS) Division and NICS Section, and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).

To determine the extent to which DOJ has administered the reward and penalty provisions of the act and whether these provisions provide incentives for states to share records, we assessed state record estimates for 2009, 2010, and 2011 and two reports from the National Center for State Courts that evaluated these estimates.<sup>5</sup> We reviewed the scope, methodology, and findings of the reports and conducted related interviews with center officials. We determined that the scope and methodology were sufficient for us to rely on the results. We also interviewed officials from our 6 selected states on the process they used for completing the estimates and related challenges, and the effect of the act's reward and penalty provisions on record sharing. Further, we interviewed officials with the National Center for State Courts and the National Consortium for Justice Information and Statistics (SEARCH) who were responsible for collecting state record estimates and evaluating their

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<sup>5</sup>The National Center for State Courts is an independent, nonprofit court improvement organization that conducts research, information services, education, and consulting.



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reasonableness.<sup>6</sup> From these interviews, we learned more about the reasonableness of the estimates, changes to the estimate methodology over time, and next steps for the estimates.

To determine the extent to which states are providing a means for individuals with a precluding mental health adjudication or commitment to seek relief from the associated federal firearms prohibition, we interviewed officials in each of the 16 states that had a federally certified relief program as of May 2012 to identify why they developed a program and related challenges, the extent of federal assistance received, and data on the number of relief applicants to date.<sup>7</sup> We also interviewed officials from the 6 sample states and DOJ components to learn about states' motivation to establish relief programs, challenges to doing so, and DOJ resources available to help states. Additionally, we interviewed groups with an interest in, among other things, relief from disability programs and firearm background checks, including Mayors Against Illegal Guns, the National Rifle Association, and Gun Owners of America. Appendix I contains a more detailed discussion of our objectives, scope, and methodology.

We conducted this performance audit from August 2011 to July 2012 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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## Background

The permanent provisions of the Brady Handgun Violence Prevention Act (Brady Act) took effect on November 30, 1998. Under the Brady Act, before a federally licensed firearms dealer can transfer a firearm to an unlicensed individual, the dealer must request a background check through NICS to determine whether the prospective firearm transfer

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<sup>6</sup>SEARCH's primary objective is to identify and help solve the information management and information-sharing challenges of state, local, and tribal justice and public safety agencies confronted with the need to exchange information with other local agencies, state agencies, agencies in other states, or the federal government.

<sup>7</sup>In June 2012, 3 additional states received certification of their relief from disabilities programs. We did not interview officials in these states.

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would violate federal or state law.<sup>8</sup> The Brady Act's implementing regulations also provide for conducting NICS checks on individuals seeking to obtain permits to possess, acquire, or carry firearms. Under federal law, there are 10 categories of individuals who are prohibited from receiving or possessing a firearm.<sup>9</sup> During a NICS check, descriptive data provided by an individual, such as name and date of birth, are to be used to search three national databases containing criminal history and other relevant records to determine whether or not the person is disqualified by law from receiving or possessing firearms.

- **Interstate Identification Index (III)**—Managed by the FBI, III is a system for the interstate exchange of criminal history records. III records include information on persons who are indicted for, or have been convicted of, a crime punishable by imprisonment for a term exceeding 1 year or have been convicted of a misdemeanor crime of domestic violence.
- **National Crime Information Center (NCIC)**—An automated, nationally accessible database of criminal justice and justice-related records, which contains, among other things, information on wanted persons (fugitives) and persons subject to restraining orders.
- **NICS Index**—Maintained by the FBI, this database was created for presale background checks of firearms purchasers and contains information on persons predetermined to be prohibited from possessing or receiving a firearm.

According to DOJ, approximately 16 million background checks were run through NICS during 2011, of which about half were processed by the FBI's NICS Section and half by designated state and local criminal justice agencies. States may choose among three options for performing NICS checks, which include the state conducting all of its own background

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<sup>8</sup>Pursuant to ATF regulations, a Federal Firearms License is a license that enables an individual to engage in commerce in firearms, including dealing in firearms, manufacturing ammunition and firearms, and importing firearms.

<sup>9</sup>Under federal law, persons are prohibited from possessing or receiving a firearm if they (1) have been convicted of a felony; (2) are a fugitive from justice; (3) are an unlawful user of or addicted to any controlled substance; (4) have been involuntarily committed to a mental institution or judged to be mentally defective; (5) are aliens illegally or unlawfully in the United States, or certain other aliens admitted under a nonimmigrant visa; (6) have been dishonorably discharged from the military; (7) have renounced their U.S. citizenship; (8) are under a qualifying domestic violence restraining order; (9) have been convicted of a misdemeanor crime of domestic violence. In addition, federal law prohibits persons under felony indictment from receiving a firearm. See 18 U.S.C. § 922(g) and § 922(n).

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checks, the state and DOJ sharing responsibility for background checks, or DOJ conducting all background checks for a state. See appendix II for further discussion of these differences.

The Gun Control Act of 1968,<sup>10</sup> as amended, and ATF regulations<sup>11</sup> establish the definitions of the mental health and unlawful drug use prohibiting categories and, therefore, the scope of relevant records to be made available to the FBI by states and territories. As defined in ATF regulations, mental health records that would preclude an individual from possessing or receiving a firearm include (1) persons who have been adjudicated as “a mental defective,” including a finding of insanity by a court in a criminal case, incompetent to stand trial, or not guilty by reason of insanity,<sup>12</sup> and (2) individuals involuntarily committed to a mental institution by a lawful authority.<sup>13</sup> The prohibitor—that is, the condition or factor that prohibits an individual from possessing or receiving firearms—does not cover persons in a mental institution for observation or a voluntary admission to a mental institution. Mental health records are found within two databases checked during a NICS background check, the III, and the NICS Index.

Federal law prohibits individuals who are unlawful users of or addicted to any controlled substance from possessing or receiving a firearm. ATF regulations define an unlawful user of or addicted to any controlled substance as a person who uses a controlled substance and has lost the power of self-control with reference to the use of the controlled substance and any person who is a current user of a controlled substance in a

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<sup>10</sup>Pub. L. No. 90-618, 82 Stat. 1213 (1968).

<sup>11</sup>27 C.F.R. § 478.11.

<sup>12</sup>ATF regulations at 27 C.F.R. § 478.11 defines “adjudicated as a mental defective” as a determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease: (1) is a danger to himself or others; or (2) lacks the mental capacity to contract or manage his own affairs. The terms shall include—(1) a finding of insanity by a court in a criminal case; and (2) those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b.

<sup>13</sup>ATF regulations at 27 C.F.R. § 478.11 define the term “committed to a mental institution” as a formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes commitments for other reasons, such as for drug use.

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manner other than as prescribed by a licensed physician. In general, under these regulations, use of such substances is not limited to the precise time the person seeks to acquire or receives a firearm; instead, inference of current use may be drawn from evidence of recent use or pattern of use through convictions, multiple arrests, and failed drug tests, among other situations. ATF regulations further provide examples upon which an inference of current use may be drawn, including a conviction for use or possession of a controlled substance within the past year or multiple arrests related to controlled substances within the past 5 years if the most recent arrest occurred within the past year.<sup>14</sup> Unlawful drug use records associated with a criminal arrest or conviction are generally found in the III and those that are not associated with an arrest or conviction are entered into the NICS Index. FBI officials reported that states submit the vast majority of their unlawful drug use records to the III.

Since state submission of records to NICS is voluntary, the NIAA strives to increase the availability of state records through a series of financial incentives. To reward states for submitting records, the NIAA provides that beginning in January 2011, a state shall be eligible to receive a waiver of the 10 percent matching requirement for DOJ's National Criminal History Improvement Program (NCHIP) grants if the state provides at least 90 percent of its records relevant to the determination of whether a person is disqualified from possessing or receiving a firearm.<sup>15</sup> NIAA penalty provisions provide that during the period January 8, 2011, to January 8, 2013, the U.S. Attorney General may withhold up to 3 percent of the amount that would otherwise be allocated to a state under DOJ Edward Byrne Memorial Justice Assistance (JAG) Program formula

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<sup>14</sup>More specifically, the ATF regulations provide that "such use is not limited to the use of drugs on a particular day, or within a matter of days or weeks before, but rather that the unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct. A person may be an unlawful current user of a controlled substance even though the substance is not being used at the precise time the person seeks to acquire a firearm or receives or possesses a firearm." This definition additionally provides that "an inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time, e.g., a conviction for use or possession of a controlled substance within the past year; multiple arrests for such offenses within the past 5 years if the most recent arrest occurred within the past year; or persons found through a drug test to use a controlled substance unlawfully, provided that the test was administered within the past year." 27 C.F.R. § 478.11

<sup>15</sup>The NIAA provides that such disqualification determinations are those made under subsection (g) or (n) of section 922 of title 18, United States Code, or applicable state law.

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grants if the state provides less than 50 percent of the records requested under the NIAA.<sup>16</sup> This discretionary penalty may be increased to 4 percent through 2018 and to a mandatory 5 percent penalty thereafter if a state provides less than 90 percent of records requested under the act.<sup>17</sup>

Additionally, the NIAA establishes the NARIP grant program to assist states in providing records to NICS. In order to be eligible for such grants, states must meet two conditions. First, states are to provide DOJ with estimates, pursuant to a methodology provided by the Attorney General, of their numbers of potentially NICS-applicable records. Second, states must establish a program that allows individuals who have been prohibited from possessing firearms due to a mental health adjudication or commitment to seek relief from the associated federal firearms prohibition (disability). The NIAA refers to such programs as “relief from disabilities” programs. ATF is responsible for determining whether a state’s relief program satisfies the conditions of the NIAA and has developed minimum criteria for certifying a state’s program. For example, the program has to be established by state statute—or administrative regulation or order pursuant to state law—and include due process requirements that allow persons seeking relief the opportunity to submit evidence to the lawful authority considering the relief application.<sup>18</sup>

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<sup>16</sup>The goal of the NCHIP grant program is to enhance the quality, completeness, and accessibility of criminal history record information and includes direct financial and technical assistance to states to improve their criminal records systems that support background checks. Justice Assistance Grants are used broadly for, among other things, information sharing, law enforcement, and crime victim and witness programs and can fund criminal justice records improvement and automated fingerprint identification systems.

<sup>17</sup>The NIAA additionally provides that the Attorney General may waive the application of the mandatory penalty if the state provides substantial evidence, as determined by the Attorney General, that the state is making a reasonable effort to comply with specified records submission provisions of the NIAA.

<sup>18</sup>See appendix III for a copy of ATF’s minimum criteria document.

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## Most States Have Made Limited Progress in Providing Mental Health Records and Could Benefit from DOJ Sharing Promising Practices

States increased the number of mental health records available for use during NICS background checks from 200,000 in October 2004 to 1.2 million in October 2011, but this progress largely reflects the efforts of 12 states, and most states have made little or no progress in providing these records.<sup>19</sup> DOJ and state officials identified technological, legal, and other challenges that hinder states' ability to make these records available. DOJ has made several forms of assistance available to help states provide records—including grants, conferences, and training—and the 6 states we met with generally reported finding these helpful. DOJ has begun to have states share their promising practices during regional meetings, but DOJ has not shared these practices nationally.

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## Mental Health Records Have Increased since NIAA Enactment, but Progress Largely Reflects Efforts of 12 States

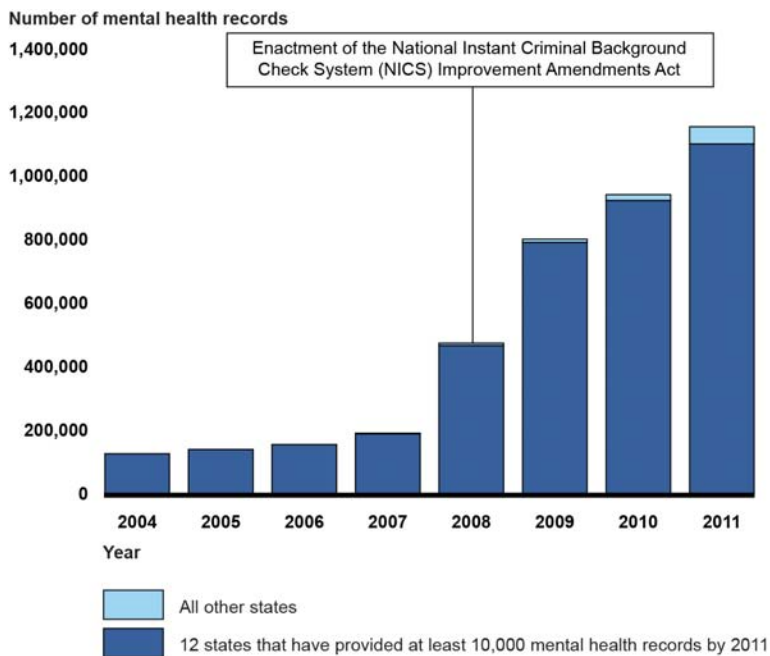
The total number of mental health records that states made available to the NICS Index increased by approximately 800 percent—from about 126,000 records in October 2004 to about 1.2 million records in October 2011—according to FBI data.<sup>20</sup> As shown in figure 1, there was a marked increase in the number of mental health records made available by states since 2008, when the NIAA was enacted. This increase largely reflects the efforts of 12 states that had each made at least 10,000 mental health records available by October 2011.

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<sup>19</sup>Unless otherwise noted, "states" will refer to all 50 states and the District of Columbia.

<sup>20</sup>According to NICS Section officials, the vast majority of mental health records that states make available are contained in the NICS Index. The officials noted that states submit a small number of mental health records—such as those involving a finding by a court of not guilty by reason of insanity—to other databases but that these records cannot be readily identified.

**Figure 1: Total Number of State Mental Health Records Made Available to the NICS Index, October 2004 to October 2011**



Source: GAO analysis of FBI data.

Note: Data are as of October 1 each year.

From October 2004 to October 2011, 3 states increased the number of mental health records they made available by over 150,000 each. On the other hand, during this same time period, almost half of the states increased the number of mental health records they made available by less than 100 records. As of October 2011, 17 states and all five U.S. territories had made fewer than 10 mental health records available to the NICS Index.<sup>21</sup>

Factors other than the NIAA could have also contributed to the increase in mental health records made available to NICS, including state efforts already under way before the act, changes in state funding or leadership, and increases in the number of individuals with mental health records that

<sup>21</sup>See appendix IV for steps DOJ and states have taken to ensure the accuracy and timeliness of state mental health records made available for use during NICS background checks.

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would preclude them from receiving or possessing a firearm. In addition, in August 2008, the FBI's NICS Section requested that states move certain records they had previously submitted to a "denied persons" category in the NICS Index to more specific categories of prohibitors, including the mental health category. According to NICS Section officials, the majority of records in the mental health category were new records submitted by states and not transferred from the denied persons category.

The increase in available mental health records could be a factor in the increasing number of firearm transactions that have been denied based on these records. According to FBI data, the number of firearm transactions that were denied based on mental health records increased from 365 (or 0.5 percent of 75,990 total gun purchase denials) in 2004 to 2,124 (or 1.7 percent of 123,432 total gun purchase denials) in 2011.<sup>22</sup> According to NICS Section officials, the vast majority of these denials were based on mental health records in the NICS Index, but that a small number could have been based on prohibiting information contained in other databases checked by NICS (e.g., criminal history records in the III noting a court finding of incompetence to stand trial).

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## DOJ and States Reported That Technological, Legal, and Coordination Challenges Hindered States' Ability to Make Mental Health Records Available

### Technological Challenges

DOJ and state officials we met with identified technological challenges to making mental health records available to NICS, such as updating aging computer systems and integrating existing record systems. DOJ officials noted that technological challenges are particularly salient for mental health records because these records originate from numerous sources within the state—such as courts, private hospitals, and state offices of

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<sup>22</sup>According to NICS Section officials, the number of denials based on mental health records may be underreported, since some states conduct their own NICS checks and have not always reported the reason for denials to the FBI.



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mental health—and are not typically captured by any single state agency. For example, records that involve involuntary commitments to a mental institution typically originate in entities located throughout a state and outside the scope of law enforcement, and therefore a state may lack processes to automatically make these records available to the FBI.

In addition, 6 of the 16 states that applied for NARIP grant funding in 2011 cited technology barriers as a reason for requesting funding in their grant applications. For example, Virginia received a NARIP grant to, among other things, equip district courts with an automated means to transmit mental health records to the FBI and replace its previous manual and labor-intensive process. Five of the 6 states we reviewed also noted that technological challenges impaired their ability to identify, collect, and provide mental health records to NICS. Minnesota officials said that it is difficult to share historical records involving involuntary commitments to a mental institution since they are paper records that cannot be automatically transmitted. The 1 state in our sample that did not cite technology as a challenge, Texas, already had an automated system in place that to facilitate the transmission of mental health records. DOJ officials were aware that states faced technological barriers to making mental health records available and cited that NARIP grants help states address these challenges. Additionally, BJS has made improving the submission of mental health records, including efforts to automate the reporting of such information, a funding priority of the NARIP grant program for 2011 and 2012.

## Legal Challenges

Addressing state privacy laws is a legal challenge that some states reported facing in making mental health records available to NICS. Specifically, officials from 3 of the 6 states we reviewed said that the absence of explicit state-level statutory authority to share mental health records was an impediment to making such records available to NICS. For example, Idaho officials reported deferring to the protection of individual privacy until clear state statutory authority was established to allow state agencies to make mental health records available. Idaho enacted a law in 2010 requiring, among other things, that the state's Bureau of Criminal Identification obtain and transmit information relating to eligibility to receive or possess a firearm to NICS, and the state was preparing to submit its first set of mental health records to the NICS Index

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in the first quarter of 2012.<sup>23</sup> Overall, 20 states have been identified by the FBI as having enacted statutes that require or permit agencies to share their mental health records, and some of these states in our sample reported an increase in record availability as a result. For example, Texas enacted a law in 2009 requiring court clerks to prepare and forward certain types of mental health records to the state record repository within 30 days of specified court determinations.<sup>24</sup> Following the passage of the law, Texas officials said that the number of mental health records provided to NICS increased by about 190,000 records.

States that have not enacted laws requiring state agencies to share their mental health records could also face challenges to reporting such information based on the applicability of the federal Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule to their particular circumstances.<sup>25</sup> The HIPAA Privacy Rule establishes certain requirements for the treatment of protected health information and applies to “covered entities” including health care providers like hospitals and could also cover certain types of state agencies (e.g., departments of mental health). According to Department of Health and Human Services (HHS) officials, the Privacy Rule strikes a balance between permitting important uses and disclosures of individuals’ health information and protecting the privacy of patients who seek care by requiring covered entities to, among other things, use or disclose protected health information only as permitted by the rule. The Privacy Rule allows covered entities to disclose protected health information without written authorization of the individual under certain specified circumstances, such as where the disclosure is required by law.<sup>26</sup> Within this context, officials from 3 of the 6 states in our sample reported that the absence of explicit state statutory authority to share mental health records was an

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<sup>23</sup>Idaho Code § 67-3003(1)(i). The 2010 statute also requires Idaho state courts finding a defendant incompetent to stand trial to (1) make a finding as to whether the defendant is prohibited under federal law (18 U.S.C. 922(d)(4) and (g)(4)) from receiving or possessing a firearm, and (2) if such a finding is made, forward a copy of the order to the Idaho state police to, in turn, forward for inclusion in NICS.

<sup>24</sup>Texas Government Code § 411.052.

<sup>25</sup>45 C.F.R. Part 164.

<sup>26</sup>The Privacy Rule defines the term “required by law” to include, among other things, court orders and court-ordered warrants; subpoenas or summons issued by a court, grand jury, a governmental or tribal inspector general; or an administrative body authorized to require the production of information.

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impediment to making such records available to NICS. To help address these types of challenges as they relate to HIPAA, DOJ has asked HHS to consider a potential change to the Privacy Rule that would specifically allow disclosure of mental health records for NICS reporting purposes. According to a senior HHS health information privacy policy specialist, HHS is in the process of reviewing this issue and has not yet made a decision to pursue a proposed change to the Privacy Rule.

## Coordination Challenges

DOJ and state officials we met with said that states often faced challenges in getting relevant state agencies to collaborate, particularly because many mental health records reside in entities—such as hospitals and departments of mental health—that are typically not connected to the law enforcement agencies that make the majority of records available to NICS. For example, according to the State of Illinois’ Office of the Auditor General, approximately 114,000 mental health records were maintained in state nursing homes, private hospitals, state mental health facilities, and circuit courts in 2010.<sup>27</sup> However, because of coordination and other challenges, only about 5,000 records (or 4.4 percent) were made available to the FBI. In addition, 2 of the 6 states in our sample reported that deciding which state agency would act as the liaison to the FBI was challenging because of limited staff resources and technological requirements needed to make records available. New Mexico, for instance, has not yet assigned responsibility to an agency to be the primary entity for making mental health records available to the FBI, despite discussions surrounding this issue over the past 4 years. New Mexico’s Administrative Office of the Courts has recently provided records on approximately 6,000 individuals who were committed to a mental institution directly to the FBI for NICS checks, but state officials have not yet coordinated their efforts and decided collectively on what entity will be responsible for providing such records in the future because of the resources needed to do so.

DOJ acknowledged that complete reporting of state records to national databases can best be achieved through the cooperative efforts of all entities that create the records. Underscoring the importance of collaboration, BJS has recommended that NARIP grant recipients use a portion of grant funds to establish NICS Record Improvement Task

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<sup>27</sup> State of Illinois, Office of the Auditor General, *Management Audit of the Department of State Police’s Administration of the Firearm Owner’s Identification Act* (Springfield, Illinois: April 2012).

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Forces, to include representatives from the central record repository and other agencies. According to DOJ, task forces with wide representation can provide a forum for exploring possible options for improving the quality, completeness, and availability of NICS records. Idaho officials, for example, noted that forming such a multijurisdictional working group was extremely helpful for learning which state entities housed relevant mental health records.

DOJ officials also said that several states overcame coordination challenges by conducting outreach to entities involved with providing mental health records and educating them about the importance of making such records available to NICS. Texas Department of Public Safety officials reported collaborating closely with courts by distributing training and guidance documents to ensure that the courts understood the types of mental health records that should be made available to NICS. The guidance materials also include an outline of the importance of mental health records for background checks, the types of cases to report, instructions on how to input relevant records into Texas's record system, and a frequently asked questions document for reference.

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## States Generally Found DOJ Assistance with Providing Mental Health Records Helpful

### Grants

NARIP grants were established to improve the completeness, automation, and transmittal of records used during NICS background checks. Since its inception 3 years ago, the grant program has awarded approximately \$40 million to 14 states.<sup>28</sup> DOJ has placed an emphasis on increasing the submission of mental health records as part of the 2011 and 2012 grant solicitations. Of the 16 NARIP grant applicants in 2011, 11 applicants requested funding for mental health record-related

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<sup>28</sup>Section 103 of the NIAA authorizes appropriations for the NARIP grants for fiscal years 2009 through 2013 in the following amounts: fiscal year 2009: \$125 million; fiscal year 2010: \$250 million; fiscal year 2011: \$250 million; fiscal year 2012: \$125 million; fiscal year 2013: \$125 million. Actual appropriations have been as follows: fiscal year 2009: \$10 million (Pub. L. No. 111-8, 123 Stat. 524 (2009)); fiscal year 2010: \$20 million (Pub. L. No. 111-117, 123 Stat. 3034 (2009)); fiscal year 2011: \$16.1 million (Pub. L. No. 112-10, 125 Stat. 38 (2011)); fiscal year 2012: \$5 million (Pub. L. No. 112-55, 125 Stat. 552 (2011)).

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activities. In addition, 6 of the 16 NARIP grant applicants in 2011 requested funds for technology-related improvements to increase the submission of mental health records, including updating information system hardware and automating the record submission process.

Officials from 2 of the 3 states in our sample that received NARIP grants reported using a portion of the funds to address technological barriers to submitting mental health records. For example, Idaho officials reported using NARIP grant funds it received in 2010 to create a new transmission protocol to provide relevant data related to state mental health records. State officials said these grants were instrumental in funding the programming, testing, and software upgrades needed to create the database. State officials have also reported using NARIP grants to research which state agencies house mental health records that could be used during NICS background checks. Specifically, 6 of the 16 NARIP grant applicants in 2011 requested funding to conduct assessments to identify where relevant mental health records reside within the state in order to improve their efforts to provide such records for a NICS check.

In addition to NARIP grants, DOJ administers the National Criminal History Improvement Program and JAG Program, which can also be used to support state efforts to improve mental health records, among other things. For example, in 2008, we reported that from fiscal years 2000 through 2007, almost \$940,000 in NCHIP grants were specifically targeted to improve the availability of mental health record for use during NICS background checks.<sup>29</sup> All 6 states in our sample have received NCHIP grants, but officials in all of these states said they did not use the funding to improve the submission of mental health records. Rather, these states used NCHIP funds for activities regarding criminal history records in state repositories. For example, 1 state in our sample used 2011 NCHIP funds to reconcile approximately 60,000 open arrest records with their corresponding dispositions. The JAG Program also supports information-sharing programs in criminal justice entities. For example, in 2009, states spent \$89.6 million (7 percent of total funds for that year) on information-sharing projects, such as initiatives to increase records provided to NICS. An additional \$33 million (3 percent) was spent on

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<sup>29</sup>GAO, *Bureau of Justice Statistics Funding to States to Improve Criminal Records*, [GAO-08-898R](#) (Washington, D.C.: July 8, 2008).

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criminal records management upgrades and other technology for information sharing.<sup>30</sup>

## Training

DOJ also offers in-state training sessions to educate state agencies about NIAA-related topics, including issues related to the submission of mental health records. For example, since enactment of NIAA, the NICS Section has reported conducting presentations to law enforcement officials responsible for providing records to NICS. Specifically, DOJ reported conducting in-state trainings and presentations in 7 states. These presentations covered the definition of the mental health prohibitor and how to enhance state plans regarding the submission of mental health records. Further, 3 of the 6 states in our sample reported using these training presentations to provide information about the mental health prohibitor. For instance, at Texas's request, the NICS Section held presentations for judges, clerks, and other relevant parties to answer questions about the types of mental health records requested under NIAA. Additionally, Washington state officials were complimentary of the NICS Section personnel that travel once a year to eight different locations within the state to provide training on the federal prohibitors to their law enforcement agencies.

## Conferences

DOJ also hosts and sponsors conferences in which relevant DOJ components present information on numerous topics, including those related to making more mental health records available. For example, DOJ's first conference regarding NIAA provisions—the NIAA Implementation Conference—was held in 2009, and DOJ officials reported that officials from almost every state attended. The NICS Section also sponsors annual Report, Educate, Associate Criminal Histories (R.E.A.C.H.) conferences, which focus on improving information sharing between the NICS Section and external agencies. The NICS Section also sponsors annual NICS User Conferences for states that conduct their own NICS checks, which covers topics such as the federal firearm prohibitors and how to submit records to the NICS Index. Officials from all 6 states in our sample had attended at least one DOJ-sponsored conference and generally found these events to be helpful for learning about various aspects of the NIAA, such as how to make certain mental health records available to the FBI. Additionally, an official from 1 of the 6

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<sup>30</sup>National Criminal Justice Association, *Byrne JAG Improves Public Safety and Prevents Crime: How States Use the Byrne JAG Formula Grant Program to Advance Criminal Justice Information Sharing*, 2010.

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states in our sample said that the documents distributed by DOJ were particularly useful and officials in their state referenced them regularly.

Beginning in 2011, DOJ began sponsoring annual regional NIAA conferences, in conjunction with the National Center for State Courts and SEARCH. These events are intended to provide a forum for states to share their experiences in identifying, collecting, automating, and submitting records. For example, at the December 2011 regional NIAA meeting, Oregon officials shared their state's experience in developing a system to share mental health records, including an explanation of which state agencies collaborated to share such records and how the state used NARIP grant funds to automate and transmit records. Two of the 6 states in our sample also reported benefiting from learning about other states' experiences in collecting and submitting mental health records. Specifically, officials in Idaho and Washington noted that hearing about other states' experiences during a regional conference provided them with technical advice on how to create linkages between existing mental health record systems and helped them determine where relevant records resided. In some cases, the sharing of experiences with mental health records led to sustained relationships and networks among states. For example, following their presentation to several northeastern states at a 2011 NIAA regional conference, New York officials reported sharing best practices and lessons learned with Connecticut and New Jersey officials. According to DOJ officials, five regional conferences have been held, with a total of 38 states attending one of these meetings.

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## DOJ Has Not Identified and Disseminated Promising Practices of Successful States Nationally

Although hearing about the experiences of other states during regional conferences has been helpful for some states in making mental health records available to NICS, DOJ has not yet identified promising practices employed by all states or shared this information nationally.<sup>31</sup> Officials from all 6 states in our sample noted that the sharing of promising practices among states may be helpful to, among other things, guide future policy decisions and spur ideas on how to improve reporting efforts. Further, BJS officials acknowledged that there are benefits to sharing such practices and said that learning about the experiences of other states can introduce state officials to new ways of approaching challenges, such as how to address technology challenges, legal barriers, and coordination issues.

The NIAA requires BJS to submit an annual report to Congress and those states participating in NCHIP that outlines best practices of those states regarding the collection, maintenance, automation, and transmittal of information for use in a NICS check once the agency considers certain actions to be best practices. BJS officials said that they have not yet reported on best practices because they were uncertain whether there were enough practices in place that could be considered best practices. However, the officials noted that they recognized the value of states learning about the experiences of other states and that this information would be useful for those states that were presently making few records available. Further, internal control standards note that agency management should ensure that pertinent information is identified, captured, and distributed in a form and time frame that permits people to perform their duties efficiently.<sup>32</sup> Identifying and distributing promising practices nationally could better position DOJ to assist states in the early

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<sup>31</sup>Although often used interchangeably, best practices typically represent a higher standard of proven effectiveness than promising practices. The National Resource Center defines a best practice as a program, activity, or strategy that has been shown to work effectively and produce successful outcomes and is supported to some degree by subjective and objective data sources. On the other hand, a promising practice is a program, activity, or strategy that has worked within one organization and shows promise during its early stages for becoming a best practice with long-term sustainable impact. A promising practice must have some objective basis for claiming effectiveness and must have the potential for replication among other agencies. The National Resource Center, *Intermediary Development Series: Identifying and Promoting Promising Practices*. 2004

<sup>32</sup>GAO, *Standards for Internal Control in the Federal Government*, [GAO-AIMD-00-21.3.1](#) (Washington, D.C.: Nov. 1999).



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phases of their efforts to make mental health records available and address barriers they face in providing these records.

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## States Generally Are Not Sharing Unlawful Drug Use Records That Are Not Associated with an Arrest or Conviction

States' overall progress in providing unlawful drug use records—which encompasses both criminal and noncriminal records—is generally unknown; however, available data indicate that most states are not providing noncriminal records.<sup>33</sup> DOJ's overall efforts to improve criminal history records have assisted state efforts to provide unlawful drug use records. DOJ has issued guidance related to the unlawful drug use records that are noncriminal, but states in our sample raised concerns about providing these kinds of records.

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## State Progress in Providing Unlawful Drug Use Records Is Generally Unknown; Available Data Suggest Most States Are Not Providing Noncriminal Records

The states' progress in providing unlawful drug use records—which encompasses both criminal and noncriminal records—is generally unknown, but available data suggest that most states are not providing the noncriminal records. According to NICS Section officials, the majority of unlawful drug use records that states make available for NICS checks are criminal records—such as those containing convictions for use or possession of a controlled substance—and are made available to NICS through the III. The officials noted, however, that these criminal records cannot readily be disaggregated from the over 60 million other criminal history records in the database because there is no automatic process to identify subsets of records within the III in each prohibited category.<sup>34</sup> Three of the 6 states in our sample—Idaho, Washington, and New York—were able to provide data on the number of criminal drug use records they made available to NICS, which showed 14,480 records, 553,433 records, and 1,659,907 records as of January 2012, January 2012, and December 2011, respectively.

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<sup>33</sup>With respect to the statutory unlawful drug use prohibitor, under ATF regulations and guidance, unlawful drug use records can include both criminal drug use records (those with an associated arrest or conviction) and noncriminal drug use records (those without an associated arrest or conviction). Noncriminal drug use records, for example, can be the basis for an inference of current use or possession of a controlled substance and such an inference may be drawn from evidence of a recent use such as a drug test found to be positive for a controlled substance.

<sup>34</sup>Search queries in the III are done using names and other identifiers. If a match is found, the record requests are made from the appropriate state record repository.

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The states' progress in sharing unlawful drug use records that are noncriminal is also generally unknown because, per regulation, these records are retained in the NICS Index for only 1 year after the date of the operative event (e.g., the date of the most recent drug-related arrest in the case of an individual with multiple drug-related arrests). According to NICS Section officials, because these records are routinely added and deleted from the NICS Index, the overall trend in the states' efforts to provide these records is difficult to discern. Available data suggest, however, that most states are not making these records available. According to FBI data, on May 1, 2012, the NICS Index contained a total of 3,753 unlawful drug use records that are noncriminal, of which about 2,200 came from Connecticut.<sup>35</sup> On the other hand, also on that date, 30 states, the District of Columbia, and all five U.S. territories had not made any of these records available. DOJ officials agreed that most states generally are not making these records available.

From 2004 to 2011, an increasing number (but a lower percentage) of firearm transactions were denied based on unlawful drug use records that states make available to NICS. According to FBI data, the number of firearm transactions that were denied based on unlawful drug use records (both criminal and noncriminal) increased from 5,806 in 2004 (7.6 percent of 75,990 total denials) to 7,526 in 2011 (6.1 percent of 123,432 total denials).<sup>36</sup> The FBI did not have data on the number of firearm transactions that were denied based on criminal versus noncriminal drug use records, but NICS Section officials noted that the vast majority of denials have been based on criminal records.

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<sup>35</sup>Officials from Connecticut said that they convened multiple state agencies over a period of several months to develop a list of 50 statutes and codes that the state would report to the NICS Index for unlawful drug use, which includes misdemeanors for the illegal sale of prescription drugs or infractions for the possession of marijuana. The officials added that the majority of these records are from cases where a person mails in a fine for possessing a small amount of marijuana, which in Connecticut does not result in an arrest or court appearance.

<sup>36</sup>As with the denials based on mental health records, NICS Section officials noted that the number of denials based on unlawful drug use records may be underreported since some states conduct their own NICS checks and have not always reported the reason for denials to the FBI.

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## DOJ's Efforts Assist States in Providing Unlawful Drug Use Records

DOJ efforts to help states address challenges in providing criminal drug use records have increased the ability of states to provide such records. Officials from the states in our sample identified several challenges related to criminal drug use records. For example, officials from 3 of the 6 states noted that having drug-related records without fingerprints was a challenge because fingerprints are needed to send these records to state repositories and the III. Additionally, officials from 3 of the 6 states reported that it was difficult to match arrest records from drug offenses to their corresponding dispositions, making it sometimes challenging to determine if an individual should be prohibited under federal law from receiving or possessing a firearm.

DOJ has engaged in various efforts to address state challenges in providing criminal history records—including unlawful drug use records—and officials from the states in our sample were generally satisfied with the assistance they have received. Using NCHIP grants—which are intended to help states enhance the quality, completeness, and accessibility of criminal history records—states have purchased systems to automate criminal history records, researched arrest records to reconcile them with their corresponding dispositions, and performed audits of local law enforcement agencies' criminal history record systems. Further, during a NIAA conference, officials from 1 state reported using NARIP grants to develop software that automatically linked arrests to their corresponding dispositions, which allowed the state to move away from paper-based files and ultimately resulted in the state making more criminal records available for NICS checks. Additionally, the National Center for State Courts, under a DOJ grant, is managing a project to nationally disseminate guidance, information, and state best practices to help ensure the completeness of criminal history records located in state repositories. Specifically, the center is designing an online repository of resources for states to improve their reporting of criminal dispositions and arrests, including those that involve unlawful drug use. A center official reported that the project is scheduled to be completed by April 2013. NARIP funding has also been used to address challenges to providing criminal drug use records. For example, Idaho state officials reported using NARIP grants to replace aging fingerprint-scanning technology in order to make fingerprints more readily available for criminal disposition records.

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## DOJ Has Issued Guidance on Noncriminal Unlawful Drug Use Records, but States Have Concerns about Providing These Records

DOJ has taken steps to help clarify the regulatory definition of unlawful drug use records that are noncriminal for states. For example, DOJ has made copies of the regulation that identifies the scope of these records for NICS checks available on its websites. DOJ officials have also conducted presentations at NIAA regional conferences that illustrated examples of records that fall within the scope of the definition of noncriminal drug use records. Also, in January 2011, the NICS Section provided written guidance to the 13 states that conduct their own federal firearm background checks. This guidance identifies a variety of scenarios from which an inference of current unlawful drug use may be drawn, thereby constituting a prohibition. Although the majority of the document focuses on inferences that can be drawn from criminal history records, there are records outside a criminal history itself that can support such an inference—for example, a positive drug test for persons on active probation.

Despite this guidance, states generally are not making noncriminal drug use records available to NICS. For example, officials from 4 of the 6 states in our sample reported that they were uncomfortable with the amount of judgment law enforcement officials were being asked to make outside of an official court decision regarding an individual's potentially prohibited status.<sup>37</sup> Officials from 2 of these 4 states also noted that making these kinds of judgments could present a legal risk to the state and could result in lawsuits from individuals prohibited from receiving or possessing a firearm who had not been convicted of crimes. For example, Minnesota officials explained that drug tests and other ways to infer drug use or possession could be inaccurate and individuals could be prohibited from receiving or possessing firearms based on the wrong information and without due process.

Officials from 5 of the 6 states we reviewed reported other challenges in making the noncriminal subset of unlawful drug use records available to NICS. For example, officials from New Mexico and Minnesota were unaware of certain types of records that could be made available under the ATF regulatory language regarding making an inference of current drug use, such as records indicating a failed drug test for a controlled

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<sup>37</sup>With respect to the unlawful drug use prohibitor, ATF regulations provide that an inference of current use of a controlled substance may be drawn from evidence of a recent use or possession or a pattern of use or possession that reasonably covers the present time. 27 C.F.R. § 478.11.

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substance. Officials from Texas and Minnesota reported that their states did not have centralized databases that would be needed to collect these records. For example, officials from Minnesota noted that failed drug test results for individuals on active probation are kept at each individual's supervisory agency and there is no centralized system to gather these and provide them to NICS. Officials from Texas and Washington noted that new state laws permitting agencies to share these types of records would need to be established in order to overcome conflicts with their state privacy laws.

DOJ officials agreed that states generally are not making unlawful drug use records that are noncriminal available to NICS. Pursuant to ATF regulations, these records may be utilized only before their period of potential use "expires"—that is, if they relate to an operative event, like an arrest, if the event occurred within the past year. DOJ officials noted that making records available—particularly those that are removed from the system 1 year after the date of the operative event—is challenging and would require a great deal of effort, time, and resources on the part of both states and the federal government. The officials added that capturing these records has not been a priority for DOJ or the states because current efforts have focused primarily on collecting mental health records and records on misdemeanor crimes of domestic violence, records that do not expire. DOJ officials also stated that despite the department's efforts to train states and provide guidance, the scope of unlawful drug use records that are noncriminal is difficult for states to interpret.

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## DOJ Has Not Administered Reward and Penalty Provisions; Sample States Had Mixed Views on whether Provisions Provided an Incentive

DOJ has not administered NIAA reward and penalty provisions because of limitations in state record estimates, which are to serve as the basis for implementing the provisions. Officials from the states in our sample had mixed views on the extent to which the act's reward and penalty provisions—if implemented as currently structured—would provide incentives for the state to make more records available to NICS.

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## States Face Challenges Developing Record Estimates, Limiting Their Usefulness as a Basis to Implement Rewards and Penalties

Limitations in state record estimates—which are estimates of the number of applicable records states possess that are or could be made available for use during NICS checks—have hindered DOJ’s ability to administer the NIAA reward and penalty provisions. These provisions are intended to provide incentives for states to share greater numbers of records by rewarding states that provide most or all of their records and penalizing states that provide few of their records. The act further specifies that the basis for the rewards and penalties should be state record estimates and directs DOJ to develop a methodology for determining the percentages of records states are making available.

The National Center for State Courts—with which BJS contracted to review the reasonableness of the state record estimates—identified numerous limitations with the estimates.<sup>38</sup> For example, the center found that states often lacked technology to query data for the record estimates and could not access many records because they were lost, in a legacy system that was no longer available for making inquiries, or were paper files that were not stored in a manner practical for searching.<sup>39</sup> The center also found that many states lacked the ability to report certain records—such as mental health adjudications—because of state statutory issues, could not distinguish criminal unlawful drug use records from other records, or had deleted relevant records.

According to BJS officials, states face challenges in accurately estimating both the total number of unique records that reside at agencies around their states and the total number of these records that are made available electronically to NICS. The officials added that most state data systems were created and operate for the primary purpose of generating an individual’s record of arrests and prosecutions. Therefore, these systems do not have basic file analysis capabilities—such as the ability to search

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<sup>38</sup>These challenges are detailed in two publically available reports. R. Schauffler, S. Strickland, A. Mason, O. Greenspan, D. DeBacco. *NICS Improvement Amendments Act: State Records Estimates Development and Validation Project, Year One Report*. National Center for State Courts. (September, 2010), and R. Schauffler, S. Strickland, A. Gallegos, O. Greenspan, D. DeBacco, A. Webb-Edgington. *NICS Improvement Amendments Act: State Records Estimates Development and Validation Project, Year Two Report*. National Center for State Courts. (December, 2011).

<sup>39</sup>The seven categories of records requested by BJS were felony convictions, active indictments, active wants and warrants, unlawful drug use, records covering mental health adjudications, protection or restraining orders, and convictions for misdemeanor crimes of domestic violence.

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text fields for key terms—which would allow the states to search for and count certain types or categories of records. The officials noted that it is very hard to affect or change the design limitations of existing data systems and that making these kinds of changes is costly. Further, they said that changing state data systems for the purpose of counting or estimating records was not something states would need or want since most of the technical improvements states make to their systems relate to data input—such as increasing the automation of criminal records.

BJS officials were not certain the challenges with developing record estimates could be overcome, and the department is not collecting record estimates for 2012.<sup>40</sup> Although BJS has not finished analyzing the third year of state record estimates, the officials said they did not know if the state record estimates, as currently collected, would ever reach the level of precision that would be needed to administer the NIAA reward and penalty provisions. The officials noted that estimates in some of the categories—such as felony convictions and mental health—were possibly usable as the basis for rewards and penalties and that these data are more reliable than data collected in other categories.

DOJ and officials from 1 of the states in our sample said that there were some benefits to completing the record estimates. For example, based in part on New York's efforts to estimate the number of records on misdemeanor crimes of domestic violence, New York officials reported that the state passed a statute to recognize such crimes as their own category of misdemeanor, which could allow the courts to distinguish such crimes for submission to NICS. Nonetheless, in its most recent analysis of state record estimates, the National Center for State Courts reported that much remains unknown about whether this data collection exercise actually generated any benefits, such as heightened cooperation or improvements in the number of records states make available to NICS. The officials noted that after BJS finishes reviewing the state record estimates that it collected in 2011, BJS plans to convene focus groups

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<sup>40</sup>BJS officials cited other reasons for not collecting record estimates in 2012. For example, BJS officials noted that the NIAA only requires an initial estimate from states and therefore states did not need to provide an estimate every year. Second, BJS officials reported that the Paperwork Reduction Act of 1995 (Pub. L. No. 104-13 (1995)) requires DOJ to obtain Office of Management and Budget approval to collect information such as the estimates and this approval expired September 2011. Therefore, without justifying the need for additional data collection, the department could not send a data collection instrument out to states for 2012.

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with states and other stakeholders to determine which aspects of the record estimate data collection process have been useful for states and which have not. BJS will also consider what, if any, additional data it will collect from states in the future and whether it can develop a workable estimate methodology. However, until BJS establishes a basis on which rewards and penalties can be implemented, the agency will be limited in its ability to carry out these provisions of the NIAA.

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### Sample States Had Mixed Views on whether Rewards and Penalties Provide Incentives to Submit More Records

Officials from the 6 states in our sample provided mixed views on the extent to which the NIAA reward and penalty provisions, if implemented as currently structured, would provide incentives for their states to make more records available for NICS checks. With respect to the NIAA reward provision, officials from 1 state, for example, said that the waiver of the 10 percent matching requirement for NCHIP grants would be helpful and added that there have been years when the state has not applied for NCHIP funds because of the cost match.<sup>41</sup> With respect to the NIAA penalty provision, the officials added that the penalty—which in their state would have been over \$100,000 in JAG Program funding in 2011—would also motivate them to make more records available. Officials from another state agreed that the potential impact of the penalty initially was an incentive to share more records, but added that this has become less of a motivator since DOJ has not yet administered the penalty provision. Officials from the remaining 4 states were either generally unaware of the NIAA reward and penalty provisions or how they would affect state efforts to make more records available, or reported that they were a moderate to no incentive.

BJS officials reported that they believed the NIAA reward and penalty provisions provided little to some incentive for states to make records available. For instance, BJS officials said the reward provision (i.e., the waiver of the 10 percent NCHIP match) likely provided little incentive for states to make more records available because states could use or apply personnel costs (something they have to pay for regardless) to satisfy the

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<sup>41</sup>The NCHIP program requires that federal funds awarded not cover more than 90 percent of the total costs of the project being funded. The applicant must identify the source of the 10 percent nonfederal portion of the total project costs and how the match funds will be used. Applicants can satisfy the match requirement with either cash or in-kind services. NCHIP awards in 2011 ranged from \$56,000 to about \$411,000, which means the corresponding cost match ranged from about \$6,000 to about \$46,000.



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cost match requirement. Based on the amount of the 2011 grant awards, the waiver of NCHIP's 10 percent matching requirement would have resulted in an average savings of \$29,000 in matching funds per state. In terms of penalties, BJS officials said the penalty provision (i.e., percent reduction of JAG Program funding) could provide an incentive to states to some extent, but that states faced significant obstacles in making records available. Specifically, the penalty of 3 to 4 percent of JAG Program funding could have resulted in an average grant reduction of up to about \$131,000 to up to about \$176,000 per state in 2011.<sup>42</sup>

Overall, BJS officials believed that public safety interests were what motivated states to make records available, but had not yet determined the extent to which the rewards and penalties, if administered as currently structured, could provide incentives to states. When asked whether different incentives would better motivate states, the officials suggested that relaxing the restrictions on which states are eligible to receive NARIP grant funding could make funds available to more states and in turn encourage more record sharing. The officials said that given the financial condition of most state governments, positive financial incentives (such as increasing the amount of NIAA grant funding) were the best way to encourage states to take action. The NIAA reward and penalty provisions are intended to provide incentives for states to make more records available to NICS, but the provisions—as currently structured—might not provide the incentives that were envisioned by the act. Our prior work shows that having the right incentives in place is crucial for operational success.<sup>43</sup> An effective system of rewards and penalties could ultimately provide better incentives for states to make records available for NICS checks.

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<sup>42</sup>This potential penalty was calculated using the Fiscal Year 2011 JAG Program state-level grants. JAG Program grants also include a local solicitation where eligible local governments can apply for funding directly to DOJ. The NIAA penalty language refers generally to the JAG Program statute and does not differentiate between the state and local solicitations. Therefore, the potential penalty could be higher if local JAG Program funding is included.

<sup>43</sup>[GAO-AIMD-00-21.3.1.](#)

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## Nineteen States Have Programs to Relieve Federal Firearms Prohibitions for People with Precluding Mental Health Adjudications or Commitments

Nineteen states have received ATF certification of their program that allows individuals who have been prohibited from possessing firearms due to a mental health adjudication or commitment to seek relief from the associated federal firearms prohibition (disability). Grant eligibility was the primary motivation for states to develop these relief programs, but reduced funding may result in fewer new programs.

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## Nineteen States Allow Individuals to Seek Relief from Their Firearms Prohibition, Making These States Eligible for Grant Funding

From January 2009 through June 2012, ATF certified programs in 19 states that allow individuals with a precluding mental health adjudication or commitment to seek relief from the associated federal firearms prohibition, thus making these states eligible to receive NARIP grant funding.<sup>44</sup> ATF certifies such relief from disabilities programs based on the requirements contained in the NIAA.<sup>45</sup> ATF developed a minimum criteria checklist that specifies nine conditions that a state's relief program must satisfy and certifies states' programs based on these requirements. For example, a state's program must be pursuant to state statute and include due process requirements that allow persons seeking relief the opportunity to submit evidence to the lawful authority considering the relief application. This is to include the circumstances of the original firearms disability (the circumstances that resulted in the individual being prohibited from possessing firearms), the applicant's mental health record and criminal history records, and the applicant's reputation as developed

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<sup>44</sup>As mentioned previously, to be eligible for NARIP grants, states must also provide DOJ with estimates, pursuant to a methodology provided by the Attorney General, of their numbers of potentially NICS-applicable records.

<sup>45</sup>In general, the NIAA requires that such state relief from disabilities programs (1) permit a person to apply to the state for relief; (2) provide that a state court, board, commission, or other lawful authority grant the relief pursuant to state law and in accordance with the principles of due process, if the circumstances regarding the mental health-related disability and the person's record and reputation, are such that the person will not be likely to act in a manner dangerous to public safety and that the granting of relief would not be contrary to the public interest; and (3) permit a person whose application for the relief is denied to file a petition with the state court of appropriate jurisdiction for a judicial review of the denial.

through character witness statements, testimony, or other character evidence. The reviewing authority must find that the applicant will not be likely to act in a manner dangerous to public safety and that granting relief would not be contrary to the public interest.

State data collected from September 2011 through May 2012 show that 6 of the 16 states that had a certified relief from disabilities program as of May 2012 reported that they had received applications from individuals seeking relief from their firearms disability.<sup>46</sup> As shown in table 1, these states reported receiving 60 applications, 26 of which were approved.

**Table 1: Relief from Disabilities Applications Received, Approved, and Denied, as Reported from September 2011 to May 2012**

	Applications Received	Approved	Denied	Dismissed or Pending <sup>a</sup>	Program Enacted	Year	Date data collected
Virginia	26	9	6	11		2011	Dec. 2011
New York	15	0	6	9		2009	Dec. 2011
Kentucky	9	8	1			2011	May 2012
Iowa	8	6	2			2011	Jan. 2012
Oregon	2	2				2009	Feb. 2012
New Jersey <sup>b</sup>	Unknown	1	Unknown			2010	May 2012
Arizona <sup>b</sup>	Unknown					2011	Dec. 2011
Florida <sup>b</sup>	Unknown					2010	Dec. 2011
Connecticut	0					2011	Dec. 2011
Idaho	0					2010	Jan. 2012
Illinois	0					2010	March 2012
Kansas	0					2011	Feb. 2012
North Dakota	0					2011	Dec. 2011
Nevada	0					2009	Feb. 2012
Texas	0					2010	Sept. 2011
Wisconsin	0					2010	Jan. 2012
<b>Total</b>	<b>60</b>	<b>26</b>	<b>15</b>	<b>20</b>			

Source: GAO analysis of state data.

Notes: In June 2012, following completion of our audit work, three additional states—Indiana, Nebraska, and West Virginia—received certification of their relief from disabilities programs. These states' data are not included in this report.

<sup>46</sup>In June 2012, three additional states—Indiana, Nebraska, and West Virginia—received certification of their relief from disabilities programs.

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<sup>a</sup>According to Virginia officials, dismissed refers to applications that were closed with no action taken in the matter. Pending refers to applications that were under consideration but had not been approved, denied, or dismissed.

<sup>b</sup>The state did not know how many applications it had received because its court system was not centralized in a way that would allow the state to readily know this information. Officials noted, however, that they would be aware of approved applications.

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### Grant Eligibility Was an Incentive to Develop Relief Programs, but Reduced Funding May Result in Fewer New Programs

DOJ officials reported that most states that develop relief from disability programs do so to be eligible for NARIP funding, and officials from 10 of the 16 states that had ATF-approved relief programs as of May 2012 reported that eligibility to receive NARIP funds greatly motivated their state to pursue developing such a program. Officials from 5 of the remaining states said NARIP eligibility was some incentive or a moderate incentive, and officials from 1 state said it was no incentive. Given the reduced amount of NARIP funding for fiscal year 2012 (from \$16.1 million in 2011 to \$5 million in 2012), it is not clear how much of an incentive NARIP funding will be for the remaining states to pursue passing such legislation. Table 2 provides NARIP grant awards by state from fiscal year 2009 to fiscal year 2011.<sup>47</sup>

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<sup>47</sup>At the time of our review, the fiscal year 2012 grant funds had not been awarded.

**Table 2: States with Federal Relief Programs and NARIP Grant Awards by State, Fiscal Year 2009 to Fiscal Year 2011**

		<b>FY 2009 Award</b>	<b>FY 2010 Awards</b>	<b>FY 2011 Award</b>	<b>Award Total 2009 – 2011</b>	<b>Award Total as Percentage of Total NARIP funds</b>
<b>New York</b>	Division of Criminal Justice Services	\$937,411	\$5,994,588	\$3,198,502	<b>\$10,130,501</b>	25.6%
<b>Florida</b>	Department of Law Enforcement		\$3,159,228	\$2,574,915	<b>\$5,734,143</b>	14.5%
<b>Oregon</b>	Oregon State Police	\$770,849	\$2,000,000	\$1,131,260	<b>\$3,902,109</b>	9.9%
<b>New Jersey</b>	State Administrative Office of the Courts		\$860,331	\$2,772,560	<b>\$3,632,891</b>	9.2%
<b>Wisconsin</b>	Office of Justice Assistance		\$981,372	\$2,500,000	<b>\$3,481,372</b>	8.8%
<b>Connecticut</b>	Office of Policy and Management			\$3,250,000	<b>\$3,250,000</b>	8.2%
<b>Idaho</b>	Idaho State Police		\$1,949,578	\$1,206,010	<b>\$3,155,588</b>	8.0%
<b>Kentucky</b>	Justice and Public Safety Cabinet			\$1,390,181	<b>\$1,390,181</b>	3.5%
<b>Texas</b>	(1) Department of Public Safety; (2) Office of Court Administration		\$751,537	\$547,039	<b>\$1,298,576</b>	3.3%
<b>Illinois</b>	Criminal Justice Information Authority		\$1,209,500		<b>\$1,209,500</b>	3.1%
<b>Nevada</b>	Department of Public Safety	\$798,471			<b>\$798,471</b>	2.0%
<b>Virginia</b>	Department of State Police			\$764,100	<b>\$764,100</b>	1.9%
<b>Arizona</b>	Criminal Justice Commission			\$582,932	<b>\$582,932</b>	1.5%
<b>North Dakota</b>	Office of Attorney General			\$205,973	<b>\$205,973</b>	0.5%
<b>Iowa<sup>a</sup></b>					<b>\$0</b>	
<b>Kansas<sup>b</sup></b>					<b>\$0</b>	

Source: DOJ

Notes: In June 2012, following completion of our audit work, three additional states—Indiana, Nebraska, and West Virginia—received certification of their relief from disabilities programs. These states' data are not included in this report.

<sup>a</sup>Iowa, though eligible to receive NARIP funding, had not applied through the 2011 grant round.

<sup>b</sup>Kansas applied for funding in 2009 but did not meet the eligibility requirements that year, and has not applied since.

Three of the 6 states we reviewed did not have a certified relief from disabilities program. Officials in 1 of these states (whose relief program did not meet the federal standard for certification) said that NARIP funding was an incentive to establish a relief program but that the smaller amount of NARIP funding available for fiscal year 2012 is one reason why the state was not willing to extend the effort to revise its relief program to meet the federal standard in the future. Officials in the second state whose program was pending ATF review said that NARIP grant eligibility

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was a little incentive to develop a relief from disabilities programs. Officials in the third state reported that they were not aware of the NARIP grant program, and accordingly, it did not affect any decisions regarding developing a relief from disabilities program.

After the passage of the NIAA, DOJ sent a letter to every state's governor explaining the relief from disabilities program provision and the minimum criteria a state's program would have to meet for ATF certification. DOJ officials also gave presentations at state conferences and regional meetings where they discussed the relief program criteria, explained that a certified relief from disabilities program is a requirement to be eligible to receive NARIP grant funding, and provided points of contact for states to call if they needed technical assistance with their draft legislation. State officials generally had positive feedback regarding the technical assistance they received from ATF. For example, officials in Arizona said that ATF assisted the state with drafting language to amend a state statute and that this was precisely the assistance the state needed. New Jersey officials added that throughout the development of their draft relief provision legislation, ATF reviewed proposed amendments and ensured that they complied with the NIAA standards prior to the state advancing such legislation through the state legislature.

State officials reported various challenges in developing relief from disabilities programs, including managing the concerns of advocacy groups and modifying state judicial processes to meet the federal standard, such as the requirement to provide for de novo judicial review.<sup>48</sup> Officials from a state that had submitted draft relief legislation to ATF and were awaiting a determination said that managing the competing interests of various advocacy groups required a great deal of time and negotiation and was a challenge to their efforts to pass relief legislation. The officials noted that if ATF did not approve their legislation, they were not sure they would propose a new program in a future legislative session. Officials from 2 states that had successfully developed relief programs said that competing pressures came from groups representing the families of victims of gun violence, gun rights advocacy groups, and groups from the mental health community that had privacy and other concerns. Other officials from a state without a relief from disabilities program did not

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<sup>48</sup>In general, de novo judicial review is a review of the matter anew; the same as if it had not been heard before and as if no decision had been previously rendered.

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believe it was politically feasible in their state to have such a program and had therefore not sought to develop one.

Officials from 6 of the 16 states that had ATF-approved relief from disabilities programs as of May 2012 noted that managing the competing interests of advocacy groups was a challenge. For instance, officials from 1 state reported that the National Rifle Association, other gun rights advocacy groups, and members of the mental health community were all part of the process of drafting relief legislation, which took considerable time and effort to meet the federal criteria. The officials added that other states seeking to develop relief from disabilities programs should ensure buy-in with the various interested parties before the relief provision gets to the legislative stages.

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## Conclusions

Sustained federal and state efforts to increase the comprehensiveness, timeliness, and automation of records that support NICS background checks are critical to helping enhance public safety and helping to prevent tragedies such as the Virginia Tech shootings. The national system of criminal background checks relies first and foremost on the efforts of state and local governments to provide complete and accurate records to the FBI. While many states have made little progress providing critical records for gun background checks, the substantial increase in mental health records coming mostly from 12 states serves to demonstrate the great untapped potential within the remaining states and territories. States reported finding DOJ's guidance, grants, and technical assistance useful, but DOJ has opportunities to provide additional support by identifying and sharing information on promising practices on what worked for the states that have made progress sharing mental health records as well as what lessons they have learned. By identifying and distributing promising practices nationally, DOJ would be better positioned to assist states in the early phases of their efforts to make mental health records available, address barriers, and identify solutions to challenges those states face in this effort.

The NIAA reward and penalty provisions are intended to provide incentives for states to make more records available to NICS, but our review suggests that the provisions might not be providing the incentives that were envisioned by the act. Given that record sharing with NICS on the part of states is voluntary, it is important that DOJ devise an effective implementation of the incentives, including a reasonable basis upon which to base those incentives. By obtaining state views, DOJ could determine the extent to which the current NIAA provisions provide

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incentives to states, whether modifications to the provisions would provide better incentives, or if alternative means for providing incentives could be developed and implemented. Further, DOJ would need to establish a basis on which these provisions or any future rewards and penalties approaches could be administered. Carrying changes to the state record estimates, as they are defined in the NIAA, may require DOJ to develop and submit a legislative proposal to Congress to consider any alternatives. Nonetheless, an effective system of rewards and penalties could ultimately result in states providing more records for NICS background checks.

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## Recommendations for Executive Action

To help ensure effective implementation of the NIAA, we recommend that the Attorney General take the following two actions.

- To further assist states in their efforts to make mental health records available for use during NICS background checks, work with states to identify and disseminate promising state practices nationally so that states in the early phases of their efforts to make such records available can address barriers and identify solutions to challenges faced in this effort.
- To help ensure that incentives exist for states to make records available for use during NICS background checks and that DOJ has a sound basis upon which to base incentives, determine (1) if the NIAA reward and penalty provisions, if they were to be implemented, are likely to act as incentives for states to share more records, and (2) if, given limitations in current state estimates, whether DOJ can develop a revised estimate methodology whereby states are able to generate reliable estimates as a basis for DOJ to administer the NIAA reward and penalty provisions. If DOJ determines either (1) that the reward and penalty provisions are not likely to provide incentives for states to share more records or (2) that it is unable to establish a revised methodology upon which to administer the reward and penalty provisions, DOJ should assess if there are other feasible alternatives for providing incentives or administering the provisions and, if so, develop and submit to Congress a legislative proposal to consider these alternatives, as appropriate.



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## Agency Comments

We provided a draft of this report for review and comment to DOJ. The department provided written comments, which are summarized below and reprinted in appendix V. DOJ agreed with both of our recommendations and identified actions it plans to take to implement them. DOJ also provided us with technical comments, which we incorporated as appropriate.

DOJ agreed with our recommendation that the department identify and disseminate the promising practices of states in making mental health records available for use during NICS background checks. The department noted that BJS is collaborating with other relevant DOJ components to identify state promising practices. DOJ added that once these practices have been identified, BJS will disseminate this information to the states through electronic mailing lists, the BJS website, other partner agency sites, and at relevant meetings and conferences.

DOJ also agreed with our recommendation that the department (1) ensure that the NIAA reward and penalty provisions are likely to act as an incentive for states to share more records and (2) develop a methodology upon which to administer the reward and penalty provisions. In its response, DOJ noted that BJS has determined that the current methodology for reporting estimates of available records does not result in sufficiently reliable estimates on which to base rewards and penalties. In light of this conclusion, BJS decided to not collect a fourth year of estimates but instead focus its efforts on identifying whether there are solutions that would allow BJS to use the estimates in the way the NIAA intended. BJS plans to convene a focus group of states to determine whether a better methodology can be developed and, if so, what attributes the revised methodology would entail. BJS also plans to use this same focus group to explore states' reactions to the reward and penalty provisions and to assess whether those provisions are likely to provide suitable incentives for the states to increase record sharing.

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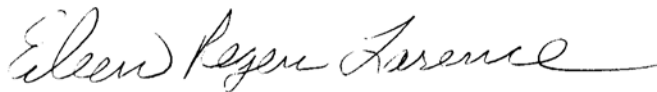
We are sending copies of this report to the appropriate congressional committees, the Department of Justice, and other interested parties. In addition, this report is available at no charge on the GAO Web site at <http://www.gao.gov>.

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If you or your staff members have any questions about this report, please contact Carol Cha at (202) 512-4456 or [chac@gao.gov](mailto:chac@gao.gov), or Eileen Larence at (202) 512-6510 or [larencee@gao.gov](mailto:larencee@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made major contributions to this report are listed in appendix VI.



Carol Cha  
Acting Director, Homeland Security and Justice Issues



Eileen Larence  
Director, Homeland Security and Justice Issues

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*List of Requesters*

The Honorable Lamar S. Smith  
Chairman, Committee on the Judiciary  
House of Representatives

The Honorable Lois Capps  
House of Representatives

The Honorable John D. Dingell  
House of Representatives

The Honorable Carolyn McCarthy  
House of Representatives

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# Appendix I: Objectives, Scope, and Methodology

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We assessed the progress the Department of Justice (DOJ) and states have made in implementing key provisions of the National Instant Criminal Background Check System (NICS) Improvement Amendments Act of 2007 (NIAA). Namely, the extent to which

- states have made progress in making mental health records available for use during NICS background checks and DOJ could take actions to help states overcome challenges in providing these records,
- states have made progress in making unlawful drug use records available for use during NICS background checks and DOJ could take actions to help states overcome challenges in providing these records,
- DOJ has administered the reward and penalty provisions provided for in the act and whether selected states report that these provisions provide incentives to make records available to the Federal Bureau of Investigation (FBI), and
- states are providing a means for individuals with a precluding mental health adjudication or commitment to seek relief from the associated federal firearm prohibition.

To determine state progress in providing mental health and unlawful drug use records, we analyzed FBI data from fiscal years 2004 through 2011—about 4 years before and after the enactment of NIAA—on the number of such records that states made available for NICS background checks and on the number of gun purchase denials based on these records. To assess the reliability of these data, we questioned knowledgeable officials about the data and the systems that produced the data, reviewed relevant documentation, examined data for obvious errors, and (when possible) corroborated the data among the different agencies, including the Bureau of Justice Statistics (BJS) and the FBI's NICS Section. We determined that the data were sufficiently reliable for the purposes of this report.

To assess the extent to which DOJ is providing assistance to help states overcome challenges in sharing records, we reviewed guidance DOJ provided to states and attended a DOJ-hosted regional conference on the NIAA held in December 2011 in DuPont, Washington. Additionally, we analyzed all NICS Act Record Improvement Program (NARIP) grant applications to identify any limitations that states reported facing when providing records and the amount of funding states believed were necessary to overcome these limitations. We analyzed grant applications from 2009, 2010, and 2011—funded and unfunded—submitted by states, territories, and tribal entities. From this, we were able to identify areas of need for which 28 states, territories, and tribal entities requested funding.

To assess the accuracy of mental health and unlawful drug use records made available for NICS checks, we analyzed the most recent round of triennial audits conducted by the FBI's Criminal Justice Information Services (CJIS) Audit Unit and the most recent set of proactive validation processes completed by the states. The most recent set of proactive validation processes involved 23 states and occurred from October 2010 through September 2011, and the audits were conducted in 42 states from 2008 through 2011.

Further, we interviewed officials from a nonprobability sample of 6 states to discuss any challenges they faced in sharing mental health and unlawful drug use records and their experiences with DOJ assistance received to address those challenges. The states selected were Idaho, Minnesota, New Mexico, New York, Texas, and Washington. We selected these states to reflect a range of factors, including the number of mental health records and unlawful drug use records made available for NICS checks, trends in making mental health records available to NICS over the past 3 years, whether the state received a grant under the NIAA, and whether the state has provided a state record estimate to the Bureau of Justice Statistics. While the results of these interviews cannot be generalized to all states, they provided insight into state challenges and state experience addressing those challenges. We also interviewed officials from various DOJ components with responsibility for managing and maintaining NICS records, which included the Bureau of Justice Statistics and the FBI's CJIS division and NICS Section. We interviewed these officials to determine, among other things, the progress states made submitting mental health and unlawful drug use records, challenges states face in doing so, and the forms of assistance DOJ is providing to help states address these challenges.

To determine the extent to which DOJ has administered the reward and penalty provisions of the act and whether these provisions provide incentives for state efforts to share records, we reviewed copies of state record estimates for 2009, 2010, and 2011 and analyzed two reports from the National Center for State Courts evaluating these estimates. We interviewed center officials about, among other things, the scope, methodology, and findings of the reports. We determined that the scope and methodology were sufficient for us to rely on the results. We also interviewed officials from the 6 states in our sample regarding (1) their incentives to make the requested records available to the FBI; (2) the extent to which the reward and penalty provisions of the act have incentivized their efforts; (3) their thoughts on whether the reward and penalty provisions would change their actions if they were carried out by

DOJ; (4) if the current reward and penalty provisions do not provide incentives, what would; and (5) the impact, if any, of DOJ not carrying out the reward and penalty provisions. We also interviewed the Bureau of Justice Statistics about its efforts to administer the reward and penalty provisions provided for in the act and the basis for its decisions. Additionally, we discussed the Bureau of Justice Statistics' position on the process for completing the state record estimates, challenges therein, and the effect of the act's reward and penalty provisions on record sharing. Further, we interviewed officials with the National Center for State Courts and the National Consortium for Justice Information and Statistics (SEARCH) who were responsible for collecting state record estimates and evaluating their reasonableness. From these interviews, we learned more about the reasonableness of the estimates, changes to the estimate methodology over time, and next steps for the estimates.

To determine the extent to which states are providing a means for individuals with a precluding mental health adjudication or commitment to seek relief from the associated federal firearms prohibition, we reviewed documentation on the minimum criteria for certification of a relief from disabilities program and the relief program requirements detailed in the NIAA. We also reviewed examples of state statutes that established relief from disability programs. Further, we interviewed officials in each of the 16 states with approved relief from disability programs as of May 2012 to learn about the challenges they faced developing their programs, motivation for developing the program, federal assistance they received, and information on the number of relief applicants to date, including how many applications had been received, approved, denied, or dismissed.<sup>1</sup> We also relied on data collected through interviews with the previously mentioned 6 sample states, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), and other DOJ components to learn about, among other things, the motivation to establish relief programs, barriers to doing so, and DOJ resources available to help states. Three of the 6 states in our sample did not have certified relief from disability programs, and we asked officials in these states why they had not pursued developing a relief program; what barriers there were to establishing a relief program; and what, if any, federal assistance they would like for establishing a relief program. Additionally, we interviewed groups with an interest in

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<sup>1</sup>In June 2012, 3 additional states received certification of their relief from disabilities programs. We did not interview officials in these states.

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relief from disability programs and NICS data more broadly, including the Brady Campaign, Gun Owners of America, Mayors Against Illegal Guns, and the National Rifle Association. We interviewed these groups to learn their positions on relief from disability programs, among other things.

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# Appendix II: State Options for Conducting Background Checks using the National Instant Criminal Background Check System

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States have three options for conducting NICS checks, referred to as full point of contact (full POC), non-POC, and partial POC. As detailed in a 2008 report funded by DOJ, in full-POC states, Federal Firearms Licensees first query the NICS databases and related state files through one or more state organizations, such as local or state law enforcement agencies—known as points of contact—and then, if necessary, the staff of the POCs carry out any required follow-up research.<sup>1</sup> In non-POC states, Federal Firearm Licensees contact the NICS Operations Center directly by telephone or via the Internet and any required follow-up research is performed by the NICS's FBI staff. In partial POC states, Federal Firearm Licensees query NICS and state files through a point of contact for handgun purchases or permits but query NICS directly for long gun purchases, such as shotguns or rifles. Figure 2 shows the distribution of POC states, partial-POC, and non-POC states.

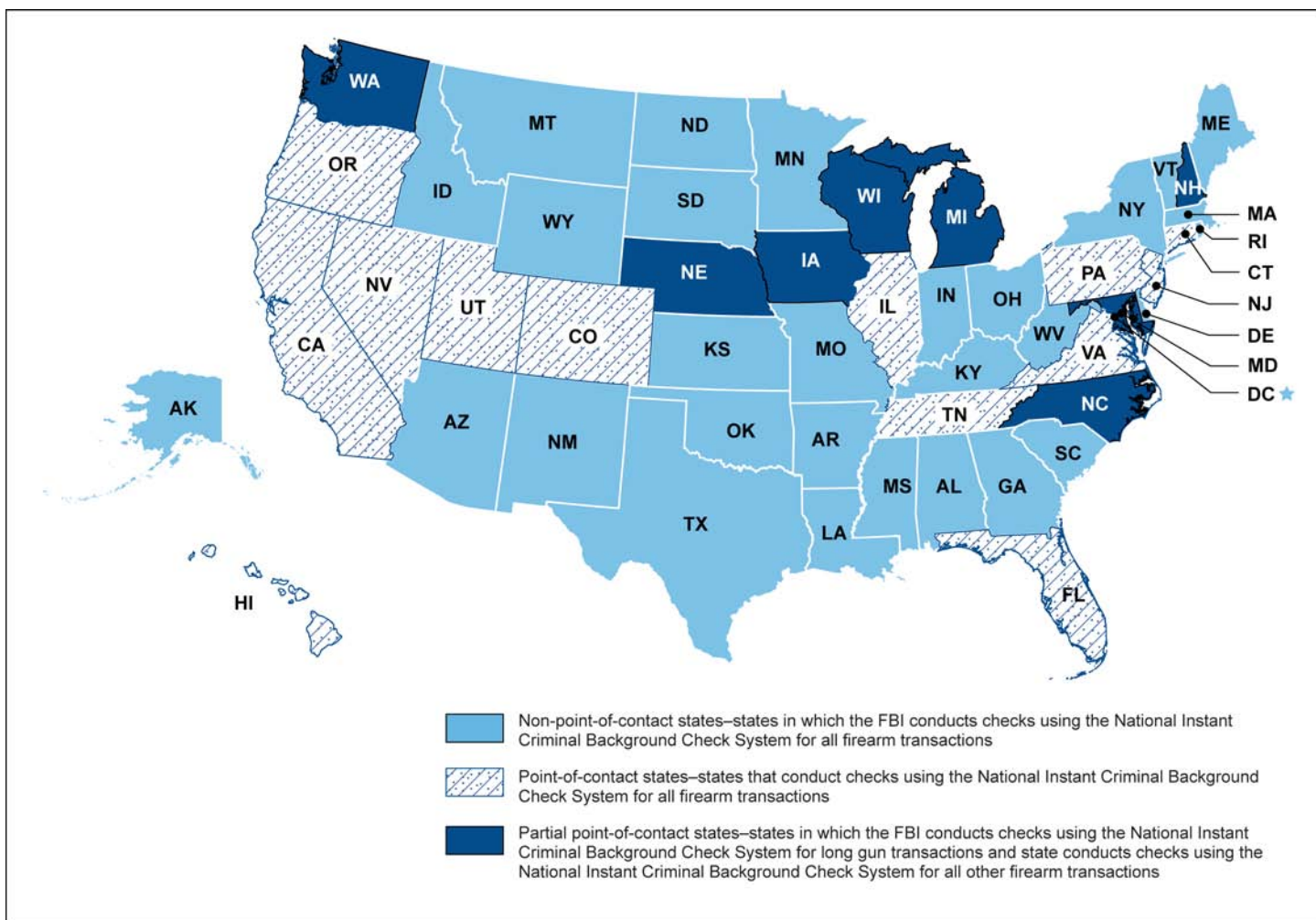
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<sup>1</sup>J. M. Tien, et. al, *Cost-Benefit of Point-of-Contact (POC) Versus Non-POC Firearm Eligibility Background Checks*, 2001-RU-BX-K002 (2008)



Appendix II: State Options for Conducting  
Background Checks using the National Instant  
Criminal Background Check System

Figure 2: Point of Contact States as of October 2011



Source: GAO analysis of DOJ data; Map Resources (map).

According to the DOJ-funded report, states elect POC or non-POC status for various reasons, such as a state's attitude toward gun ownership, since many POC states have prohibiting legislation that is stricter than federal regulations. For example, Oregon has five statutorily prohibiting categories of misdemeanor convictions in addition to domestic violence—which is the only prohibiting misdemeanor required under federal law. Additionally, there may be an economic incentive for states to elect non-POC status, since implementing and operating a POC may cost a state more money than it can collect in fees charged to Federal Firearm Licensees for conducting background checks. For example, the authors

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reported that Idaho elected not to become a full-POC state because of the added expense of performing background checks for long gun purchases.

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# Appendix III: Minimum Criteria for Certification of Qualifying State Relief from Disabilities Programs

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ATF provides guidance for states to follow in certifying that they have established a qualifying mental health relief from firearms disabilities program that satisfies certain minimum criteria under the NIAA. ATF officials said that they review states' programs according to the following minimum criteria.

1. State law: The relief program has been established by state statute, or administrative regulation or order pursuant to state law.
2. Application: The relief program allows a person who has been formally adjudicated as a "mental defective"<sup>1</sup> or committed involuntarily to a mental institution<sup>2</sup> to apply or petition for relief from the Federal firearms prohibitions (disabilities) imposed under 18 U.S.C. § 922 (d) (4) and (g) (4).
3. Lawful authority: A state court, board, commission, or other lawful authority (per state law) considers the applicant's petition for relief. The lawful authority may only consider applications for relief due to mental health adjudications or commitments that occurred in the applicant state.
4. Due process: The petition for relief is considered by the lawful authority in accordance with principles of due process, as follows:
  - a. The applicant has the opportunity to submit his or her own evidence to the lawful authority considering the relief application.
  - b. An independent decision maker—someone other than the individual who gathered the evidence for the lawful authority acting on the application—reviews the evidence.

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<sup>1</sup>Federal regulations at 27 C.F.R. § 478.11 define the term "adjudicated as a mental defective" as a determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease: (1) is a danger to himself or others; or (2) lacks the mental capacity to contract or manage his own affairs. The terms shall include—(1) a finding of insanity by a court in a criminal case; and (2) those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b.

<sup>2</sup>Federal regulations at 27 C.F.R. § 478.11 define the term "committed to a mental institution" as a formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.

- c. A record of the matter is created and maintained for review.
- 5. Proper record: In determining whether to grant relief, the lawful authority receives evidence concerning and considers the:
  - a. Circumstances regarding the firearms disabilities imposed by 18 U.S.C. § 922 (g) (4);
  - b. Applicant's record, which must include, at a minimum, the applicant's mental health and criminal history records; and
  - c. Applicant's reputation, developed, at a minimum, through character witness statements, testimony, or other character evidence.
- 6. Proper findings: In granting relief, the lawful authority issues findings that:
  - a. The applicant will not be likely to act in a manner dangerous to public safety; and
  - b. Granting the relief will not be contrary to the public interest.
- 7. De novo judicial review of a denial: The state provides for the de novo judicial review of relief application denials that includes the following principles:
  - a. If relief is denied, the applicant may petition the state court of appropriate jurisdiction to review the denial, including the record of the denying court, board, commission or other lawful authority.
  - b. In cases of denial by a lawful authority other than a state court, the reviewing court as the discretion to receive additional evidence necessary to conduct an adequate review.
  - c. Judicial review is de novo in that the reviewing court may, but is not required to, give deference to the decision of the lawful authority that denied the application for relief.
- 8. Required updates to state and federal records: Pursuant to § 102(c) of the NIAA, the state, on being made aware that the basis under which the record was made available does not apply, or no longer applies:
  - a. Updates, corrects, modifies, or removes the record from any database that the federal or state government maintains and makes available to NICS, consistent with the rules pertaining to the database; and

- b. Notifies the Attorney General that such basis no longer applies so that the record system in which the record is maintained is kept up to date.
9. Recommended procedure: It is recommended (not required) that the state have a written procedure (e.g., state law, regulation, or administrative order) to address the update requirements.

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# Appendix IV: Federal and State Efforts to Ensure the Accuracy and Timeliness of Records Used by the National Instant Criminal Background Check System

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## Accuracy

Under DOJ regulations, the FBI is to be responsible for validating and maintaining data integrity of records in NICS—including mental health and unlawful drug use records—and does so through triennial on-site audits and proactive validation processes in each state that uses or contributes to the NICS Index. According to officials from the FBI's CJIS Division, the CJIS Audit Unit conducts the on-site audits every 3 years and the validation processes are held between each audit. The CJIS officials explained that the two other databases searched during a NICS background check—the Interstate Identification Index (III) and National Crime Information Center (NCIC)—are also audited by the CJIS Audit Unit as part of its audit processes. In addition to DOJ's efforts, several of the states in our sample reported having their own processes in place to ensure the accuracy of records they make available for NICS checks.

## FBI Triennial Audits and Proactive Validation Processes

During on-site triennial audits, the CJIS Audit Unit reports that it examines a random sample of NICS Index records for accuracy, validity, and completeness through a review of documentation used to make the entry into the database. According to CJIS officials, the accuracy of a record is assessed by identifying errors in biographical information contained within a record (e.g., name or date of birth). Further, validity is ensured by determining if there is proper documentation to support the entry of the record into the NICS Index. CJIS officials cited that the completeness review is used by the Audit Unit to notify states if there is additional information that could be captured in their records to increase the likelihood of finding records of individuals prohibited from receiving or possessing a firearm within the database. According to CJIS officials, CJIS Audit Unit auditors make a determination of compliance in the areas of validity and accuracy based on a percentage of total records reviewed. At the close of each audit, the CJIS officials cited that the Audit Unit provides recommendations if there were any findings, as well as follow-up guidance, training, and assistance to the state.

According to DOJ, approximately 7,100 NICS Index records from 42 states were reviewed in the most recent round of triennial audits.<sup>1</sup> DOJ

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<sup>1</sup>FBI officials stated that they could not disaggregate the audit findings for each prohibitor because they purge any documentation of records reviewed and errors found in each category by the end of the audit because of legal implications of keeping these records in an invalid form. Therefore, the only documentation of results the FBI maintains following an audit is the aggregate findings documented within each state audit report.

officials noted that none of the states were found to be out of compliance, but 6 states were found to have records where CJIS could not determine whether the records were appropriate for entry into the NICS Index. For example, the CJIS auditors could not determine whether some mental health records were from voluntary or involuntary commitments, which is important, since only involuntary commitments would be eligible for submission to the NICS Index. Additionally, several mental health records were found inappropriate for entry into the NICS Index because they belonged to deceased individuals. According to DOJ officials, there were no findings in the most recent round of triennial audits explicitly associated with unlawful drug use records. Officials noted that the unlawful drug use category has very few records overall and is the fourth lowest contributing category of the NICS Index.

During a “proactive validation process,” CJIS officials reported that they ask states to validate their records in a manner similar to the way the CJIS Audit Unit conducts the triennial audits. The FBI NICS Section reported that it provides the state with a random sample of NICS Index records to validate and expects the state to examine these records’ documentation for accuracy, completeness, and validity. NICS Section does not make any assessments of compliance during the proactive validation process and it does not review any documentation used to validate the sample of records.

In the most recent set of proactive validation processes (October 2010 through September 2011), 13,418 records were validated by 23 states and 1,914 records were reported by states to be invalid, resulting in an 85.74 percent validity rate. Of the 23 states that conducted these processes, 16 states examined records made available to the NICS Index’s Mental Health file and 2 states examined records provided to the Controlled Substance file.<sup>2</sup> As with the triennial audits, however, the FBI could not disaggregate the audit findings for each prohibitor.

#### State Efforts to Ensure Accuracy

In addition to DOJ’s audits, 2 of the states in our sample reported taking additional steps to ensure the accuracy of the mental health and unlawful drug use records they make available for NICS checks. For example, Texas Department of Public Safety officials reported that the Texas State

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<sup>2</sup>According to NICS Section officials, the NICS Index’s Denied Persons file may also contain mental health records, among other records of individuals federally prohibited from purchasing a firearm.

Auditor's Office conducts audits of the department's criminal history records, including unlawful drug use records, every 5 years. Additionally, New Mexico officials cited the use of fingerprinting technology to automate and ensure the quality of fingerprints for criminal unlawful drug use records. None of the states in our sample has similar checks for accuracy in place for mental health records, but Idaho state officials noted that Idaho plans to conduct spot checks for accuracy on mental health records, similar to those currently done on criminal history records, once it uploads its first batch of these records to NICS.

## Timeliness

DOJ does not set goals for states regarding the timeliness of when the state makes records, including mental health and unlawful drug use records, available to the NICS Index because officials said it is the responsibility of states to set their own goals in this area. According to the FBI's NICS Section officials, the NIAA does not specify any timeliness goals for states and the sharing of state records to the NICS Index is entirely voluntary. Therefore, the NICS Section neither tracks how quickly states are making records available to the NICS Index nor provides any guidance regarding time frames between a precluding incident (e.g., involuntary commitment or a failed drug test) and when a NICS Index record should be made available. NICS Section officials also explained that some states are focused on older records that, if made available to the FBI, would preclude an individual from purchasing a gun today. Although these records may date back 20 years, the NICS Section officials view these states' contributions as a positive effort and not a shortcoming.

Some states have reported setting goals or statutory requirements for record timeliness. For example, 4 of the 6 sample states noted having state-specific timeliness requirements for the submission of mental health records. Texas and Washington state officials reported having statutory requirements to making mental health records available to the FBI ranging from 3 to 30 days. Idaho and Minnesota cited requirements that county clerks submit prohibiting mental health records to state repositories as quickly as they can upon completion of the hearing or "as soon as is practicable." With regard to unlawful drug use records, 2 states reported having state-specific time frames for the submission of arrest records to the state repository (10-day time frame in Idaho and 1-day time frame in Minnesota).



# Appendix V: Comments from the Department of Justice



U.S. Department of Justice

Office of Justice Programs

*Office of the Assistant Attorney General*

Washington, D.C. 20531

22 JUN 2012

Ms. Carol Cha  
Acting Director  
Homeland Security and Justice Issues  
Government Accountability Office  
441 G Street, NW  
Washington, DC 20548

Dear Ms. Cha:

Thank you for the opportunity to review and comment on the draft Government Accountability Office (GAO) report entitled, "Gun Control: Sharing Promising Practices and Assessing Incentives Could Better Position Justice to Assist States in Providing Records for Background Checks," (GAO-12-684). The U.S. Department of Justice (DOJ) appreciates GAO's work on this review.

The draft GAO report contains two Recommendations for Executive Action to the DOJ, which are restated in bold text below and are followed by our response.

**To help ensure effective implementation of the NIAA, we recommend that the Attorney General take the following two actions.**

- 1. To further assist states in their efforts to make mental health records available for use during NICS background checks, work with states to identify and disseminate promising state practices nationally so that states in the early phases of their efforts to make such records available can address barriers and identify solutions to challenges faced in this effort.**

The Office of Justice Programs (OJP) agrees with the Recommendation for Executive Action. OJP's Bureau of Justice Statistics (BJS) is collaborating with other relevant DOJ components to identify promising state practices, which allow records of persons prohibited from possessing firearms for mental health and other reasons to be available at the time of a National Instant Criminal Background Check System (NICS) background check. Once these practices have been identified, BJS will disseminate this information through listservs, the BJS website, other partner agency sites, and at relevant meetings and conferences.

2. To help ensure that incentives exist for states to make records available for use during NICS background checks and that DOJ has a sound basis upon which to base incentives, determine (1) if the NIAA reward and penalty provisions, if they were to be implemented, are likely to act as incentives for states to share more records, and (2) if, given limitations in current state estimates, whether DOJ can develop a revised estimate methodology whereby states are able to generate reliable estimates as a basis for DOJ to administer the NIAA reward and penalty provisions. If DOJ determines either (1) that the reward and penalty provisions are not likely to provide incentives for states to share more records or (2) that it is unable to establish a revised methodology upon which to administer the reward and penalty provisions, DOJ should assess if there are other feasible alternatives for providing incentives or administering the provisions and, if so, develop and submit to Congress a legislative proposal to consider these alternatives, as appropriate.

OJP agrees with the Recommendation for Executive Action. BJS determined that the current methodology for reporting estimates of available records does not result in sufficiently reliable estimates on which to base the application of the penalty and waiver provisions of the NICS Improvement Amendments Act of 2007 (NIAA). In light of this conclusion, BJS decided not to collect Year 4 estimates, but will focus its attention and resources on identifying whether there are solutions that would allow BJS to utilize the estimates in the way the NIAA intended. Upon completion of the analysis of Year 3 data, BJS, in collaboration with the National Center for State Courts and the SEARCH Group Inc., will convene a focus group of states to determine whether a better methodology can be developed and, if so, what attributes the revised methodology would entail. BJS will also use this same focus group to explore states' reactions to the reward and penalty provisions, and to assess whether those provisions are likely to provide suitable incentives for the states to increase record sharing.

If you have any questions regarding this response, you or your staff may contact Maureen Henneberg, Director, Office of Audit, Assessment, and Management, at (202) 616-3282.

Sincerely,



Mary Lou Leary  
Acting Assistant Attorney General

cc: James H. Burch, II  
Deputy Assistant Attorney General  
for Operations and Management

cc: Dr. James Lynch  
Director  
Bureau of Justice Statistics

Leigh Benda  
Chief Financial Officer

Maureen Henneberg  
Director  
Office of Audit, Assessment, and Management

Louise Duhamel, Ph.D.  
Acting Assistant Director, Audit Liaison Group  
Internal Review and Evaluation Office  
Justice Management Division

OJP Executive Secretariat  
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# Appendix VI: GAO Contacts and Staff Acknowledgments

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## GAO Contacts

Carol Cha, (202) 512-4456 or [chac@gao.gov](mailto:chac@gao.gov)

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## Staff Acknowledgments

In addition to the contacts above, Eric Erdman (Assistant Director), Claudia Becker, Tina Cheng, Katherine Davis, Michele Fejfar, Charlotte Gamble, Geoffrey Hamilton, Lara Miklozek, Christine Ramos, and David Schneider made key contributions to this report.

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